



DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Part 385

[Docket No. FMCSA-2022-0128]

RIN 2126-AC48

Incorporation by Reference; North American Standard Out-of-Service Criteria; Hazardous Materials Safety Permits

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: FMCSA amends its Hazardous Materials Safety Permits regulations to incorporate by reference the April 1, 2022, edition of the Commercial Vehicle Safety Alliance's (CVSA) handbook (the handbook) containing inspection procedures and Out-of-Service Criteria (OOSC) for the inspection of commercial motor vehicles used in the transportation of transuranic waste and highway route-controlled quantities of radioactive material. The OOSC provide enforcement personnel nationwide, including FMCSA's State partners, with uniform enforcement tolerances for these inspections. Through this rule, FMCSA incorporates by reference the April 1, 2022, edition of the handbook.

DATES: Effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. The incorporation by reference of the material described in the rule is approved by the Director of the *Federal Register* as of [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Mr. José Cestero, Vehicle and Roadside Operations Division, FMCSA, 1200 New Jersey Avenue SE, Washington, DC

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SUPPLEMENTARY INFORMATION: This final rule is organized as follows:

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I. Availability of Rulemaking Documents

To view any documents mentioned as being available in the docket, go to <https://www.regulations.gov/docket/FMCSA-2022-0128/document> and choose the document to review. To view comments, click this final rule, then click “Browse Comments.” If you do not have access to the internet, you may view the docket online by visiting Dockets Operations at U.S. Department of Transportation, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC 20590-0001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366-9317 or (202) 366-9826 before visiting Dockets Operations.

II. Executive Summary and 1 CFR 51

This final rule updates an incorporation by reference found at 49 CFR 385.4(b)(1) and referenced at § 385.415(b). The provision at § 385.4(b)(1) currently references the

April 1, 2021, edition of CVSA’s handbook titled “North American Standard Out-of-Service Criteria and Level VI Inspection Procedures and Out-of-Service Criteria for Commercial Highway Vehicles Transporting Transuranics and Highway Route Controlled Quantities of Radioactive Materials as defined in 49 CFR Part 173.403.” The CVSA handbook contains inspection procedures and OOSC for inspections of shipments of transuranic waste and highway route-controlled quantities of radioactive material. The OOSC, while not regulations, provide enforcement personnel nationwide, including FMCSA’s State partners, with uniform enforcement tolerances for inspections. The material is available, and will continue to be available, for inspection at the FMCSA, Office of Safety, 1200 New Jersey Avenue SE, Washington, DC 20590 (Attention: Chief, Compliance Division) at (202) 366-1812. The document may be purchased from the Commercial Vehicle Safety Alliance, 99 M Street SE, Suite 1025, Washington, DC 20003, (202) 998-1002, cvsahq@cvsa.org.

Fourteen updates distinguish the April 1, 2022, handbook edition from the 2021 edition. The updates are all described in detail in the September 7, 2022, notice of proposed rulemaking (NPRM) for this rule (87 FR at 48141). The incorporation by reference of the 2022 edition does not impose new regulatory requirements.

III. Abbreviations

CDL	Commercial Driver’s License
CVSA	Commercial Vehicle Safety Alliance
DOT	Department of Transportation
FMCSA	Federal Motor Carrier Safety Administration
FMCSRs	Federal Motor Carrier Safety Regulations
FR	Federal Register
MCMIS	Motor Carrier Management Information System
OOS	Out-of-Service
OOSC	Out-of-Service Criteria
RFA	Regulatory Flexibility Act
UMRA	The Unfunded Mandates Reform Act of 1995
U.S.C.	United States Code

IV. Legal Basis for the Rulemaking

Congress has enacted several statutory provisions to ensure the safe transportation of hazardous materials in interstate commerce. Specifically, in provisions codified at 49 U.S.C. 5105(d), relating to inspections of motor vehicles carrying certain hazardous material, and 49 U.S.C. 5109, relating to motor carrier safety permits, the Secretary of Transportation is required to promulgate regulations as part of a comprehensive safety program on hazardous materials safety permits. The FMCSA Administrator has been delegated authority under 49 CFR 1.87(d)(2) to carry out the rulemaking functions vested in the Secretary of Transportation. Consistent with that authority, FMCSA has promulgated regulations under 49 CFR part 385, subpart E to address the congressional mandate on hazardous materials safety permits. Those regulations are the underlying provisions to which the material incorporated by reference discussed in this final rule is applicable.

V. Background

In 1986, the U.S. Department of Energy and CVSA entered into a cooperative agreement to develop a higher level of inspection procedures, out-of-service (OOS) conditions and/or criteria, an inspection decal, and a training and certification program for inspectors to conduct inspections on shipments of transuranic waste and highway route-controlled quantities of radioactive material. Thereafter, CVSA developed the North American Standard Level VI Inspection Program for Transuranic Waste and Highway Route Controlled Quantities of Radioactive Material. This inspection program for select radiological shipments includes inspection procedures, enhancements to the North American Standard Level I Inspection, radiological surveys, CVSA Level VI decal requirements, and the “North American Standard Out-of-Service Criteria and Level VI Inspection Procedures and Out-of-Service Criteria for Commercial Highway Vehicles Transporting Transuranics and Highway Route Controlled Quantities of Radioactive

Materials as defined in 49 CFR Part 173.403.” As of January 1, 2005, all vehicles and carriers transporting highway route-controlled quantities of radioactive material must pass the North American Standard Level VI Inspection prior to the shipment being allowed to travel in the United States. All CMVs transporting highway route-controlled quantities of radioactive material shipments into the United States must also pass the North American Standard Level VI Inspection either at the shipment’s point of origin or when the shipment enters the United States.

Section 385.415 of title 49, Code of Federal Regulations, prescribes operational requirements for motor carriers transporting hazardous materials for which a hazardous materials safety permit is required. Section 385.415(b) requires that motor carriers ensure a pre-trip inspection is performed on each motor vehicle to be used to transport a highway route-controlled quantity of a Class 7 (radioactive) material, in accordance with the requirements of CVSA’s handbook titled “North American Standard Out-of-Service Criteria and Level VI Inspection Procedures and Out-of-Service Criteria for Commercial Highway Vehicles Transporting Transuranics and Highway Route Controlled Quantities of Radioactive Materials as defined in 49 CFR Part 173.403.”

Covid-19 affected the number of roadside inspections for Level I – Level VI primarily during 2020 and 2021. In 2018–2019 approximately 3.5 million Level I – Level VI inspections were performed annually, as compared to 2020-2021 where approximately 2.7 million Level I – Level VI inspections were performed annually. Across all years, nearly 96 percent of these inspections in each year were Level I, Level II, and Level III inspections. During 2018-2019 an average of 1,010 Level VI inspections were performed annually which dropped to an average of 600 annually during 2020-2021 due to Covid-19. On an annual basis Level VI inspections comprise only 0.02 percent of all inspections and, on average, OOS violations were cited in only 6 Level VI inspections annually (0.6 percent). In comparison, on average, OOS violations were cited in 26

percent of all Level I, 25 percent of all Level II, and 6 percent of all Level III inspections annually across 2018-2021 irrespective of Covid-19. As these statistics demonstrate, OOS violations are cited in a far lower percentage of Level VI inspections than Level I, II, and III inspections, due largely to the enhanced oversight and inspection of these vehicles because of the sensitive nature of the cargo being transported.

The changes to the 2022 edition of the CVSA handbook are intended to ensure clarity in the presentation of the OOS conditions and are generally editorial or ministerial. As discussed below, FMCSA does not expect the changes made in the 2022 edition of the CVSA handbook to affect the number of OOS violations cited during Level VI inspections.

VI. Discussion of Proposed Rulemaking and Comments

A. Proposed Rulemaking

FMCSA published a NPRM on August 8, 2022 (87 FR 48141). Whereas the incorporation by reference found at 49 CFR 385.4 and referenced at 49 CFR 385.415(b) references the April 1, 2021, edition of CVSA's "North American Standard Out-of-Service Criteria and Level VI Inspection Procedures and Out-of-Service Criteria for Commercial Highway Vehicles Transporting Transuranics and Highway Route-Controlled Quantities of Radioactive Materials as defined in 49 CFR part 173.403," the NPRM proposed to incorporate by reference the April 1, 2022, edition. Fourteen updates distinguish the April 1, 2022, edition from the 2021 edition. Each of the changes was described and discussed in detail in the NPRM. Generally, the changes serve to clarify or provide additional guidance to inspectors regarding uniform implementation and application of the out-of-service criteria, and none is expected to affect the number of out-of-service violations cited during Level VI inspections. The incorporation by reference of the 2022 edition does not change what constitutes a violation of FMCSA regulations.

B. Comments to the NPRM

FMCSA solicited comments concerning the NPRM for 30 days ending September 7, 2022. By that date, one comment was received from CVSA, which commended FMCSA for publishing the NPRM and encouraged FMCSA to finalize the rule and update the incorporation by reference.

C. Changes from the NPRM

FMCSA makes an additional revision to 49 CFR 385.4(b) in this final rule to update the address for CVSA. This change is non-substantive and ensures that the incorporation by reference information in § 385.4 is accurate and up-to-date.

VII. Section-By-Section Analysis

Section 385.4 Matter incorporated by reference

Paragraph (a) of § 385.4 is amended to conform with Office of Federal Register requirements for incorporation by reference paragraphs in regulatory text. The introductory text to paragraph (b) is amended by updating the address for CVSA. Paragraph (b)(1) is amended by replacing the reference to the April 1, 2021, edition date with a reference to the new edition date of April 1, 2022.

VII. Regulatory Analyses

A. Executive Order (E.O.) 12866 (Regulatory Planning and Review), E.O. 13563 (Improving Regulation and Regulatory Review), and DOT Regulatory Policies and Procedures

FMCSA has considered the impact of this final rule under E.O. 12866 (58 FR 51735, Oct. 4, 1993), Regulatory Planning and Review, E.O. 13563 (76 FR 3821, Jan. 21, 2011), Improving Regulation and Regulatory Review, and DOT's regulatory policies and procedures. The Office of Information and Regulatory Affairs within the Office of Management and Budget (OMB) determined that this final rule is not a significant regulatory action under section 3(f) of E.O. 12866, as supplemented by E.O. 13563, and

does not require an assessment of potential costs and benefits under section 6(a)(3) of that order. Accordingly, OMB has not reviewed it under that E.O.

The final rule updates an incorporation by reference from the April 1, 2021, edition to the April 1, 2022, edition of CVSA's handbook titled "North American Standard Out-of-Service Criteria and Level VI Inspection Procedures and Out-of-Service Criteria for Commercial Highway Vehicles Transporting Transuranics and Highway Route Controlled Quantities of Radioactive Materials as defined in 49 CFR Part 173.403." FMCSA reviewed its MCMIS data on inspections performed from 2018 to 2021 and does not expect the handbook updates to have any effect on the number of OOS violations cited during Level VI inspections. Therefore, the final rule's impact would be de minimis.

B. Congressional Review Act

This rule is not a *major rule* as defined under the Congressional Review Act (5 U.S.C. 801–808).¹

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601, et seq.) (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104-121, 110 Stat. 857), requires Federal agencies to consider the effects of the regulatory action on small business and other small entities and to minimize any significant economic impact. The term *small entities* comprises small businesses and not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000 (5 U.S.C. 601(6)). Accordingly, DOT

¹ A "major rule" means any rule that OMB finds has resulted in or is likely to result in (a) an annual effect on the economy of \$100 million or more; (b) a major increase in costs or prices for consumers, individual industries, geographic regions, Federal, State, or local government agencies; or (c) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets (49 CFR 389.3).

policy requires an analysis of the impact of all regulations on small entities, and mandates that agencies strive to lessen any adverse effects on these businesses. None of the updates from the 2022 edition impose new requirements or make substantive changes to the FMCSRs.

When an Agency issues a rulemaking proposal, the RFA requires the Agency to “prepare and make available an initial regulatory flexibility analysis” that will describe the impact of the proposed rule on small entities (5 U.S.C. 603(a)). Section 605 of the RFA allows an agency to certify a rule, instead of preparing an analysis, if the final rule is not expected to impact a substantial number of small entities. FMCSA received no comments in response to the NPRM that would cause the Agency to reconsider the initial determination that this rulemaking is not expected to impact a substantial number of small entities. This final rule updates an incorporation by reference found at § 385.4(b)(1) and referenced at § 385.415(b), and incorporates by reference the April 1, 2022, edition of the CVSA handbook. The changes to the 2022 edition of the CVSA handbook from the 2021 edition are intended to ensure clarity in the presentation of the OOS conditions and are generally editorial or ministerial. As noted above, FMCSA does not expect the changes made in the 2022 edition of the CVSA handbook to affect the number of OOS violations cited during Level VI inspections in the United States. Accordingly, I certify that this final rule will not have a significant economic impact on a substantial number of small entities.

D. Assistance for Small Entities

In accordance with section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996,² FMCSA wants to assist small entities in understanding this rulemaking so they can better evaluate its effects on themselves and participate in the rulemaking initiative. If the final rule affects your small business, organization, or

² Pub. L. 104–121, 110 Stat. 857, (Mar. 29, 1996).

governmental jurisdiction and you have questions concerning its provisions or options for compliance, please consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

Small businesses may send comments on the actions of Federal employees who enforce or otherwise determine compliance with Federal regulations to the Small Business Administration's Small Business and Agriculture Regulatory Enforcement Ombudsman (Office of the National Ombudsman, see <https://www.sba.gov/about-sba/oversight-advocacy/office-national-ombudsman>) and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of FMCSA, call 1-888-REG-FAIR (1-888-734-3247). DOT has a policy regarding the rights of small entities to regulatory enforcement fairness and an explicit policy against retaliation for exercising these rights.

E. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) (UMRA) requires Federal agencies to assess the effects of their discretionary regulatory actions. The Act addresses actions that may result in the expenditure by a State, local, or Tribal government, in the aggregate, or by the private sector of \$178 million (which is the value equivalent of \$100 million in 1995, adjusted for inflation to 2021 levels) or more in any 1 year. Though this rulemaking would not result in such an expenditure, and the analytical requirements of UMRA do not apply as a result, the Agency discusses the effects of this rule elsewhere in this preamble.

F. Paperwork Reduction Act

This rulemaking contains no new information collection requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520).

G. E.O. 13132 (Federalism)

A rule has implications for federalism under section 1(a) of E.O. 13132 if it has “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.”

FMCSA has determined that this rulemaking does not have substantial direct costs on or for States, nor does it limit the policymaking discretion of States. Nothing in this document preempts any State law or regulation. Therefore, this rulemaking does not have sufficient federalism implications to warrant the preparation of a Federalism Impact Statement.

H. Privacy

The Consolidated Appropriations Act, 2005,³ requires the Agency to assess the privacy impact of a regulation that will affect the privacy of individuals. This rulemaking does not require the collection of personally identifiable information.

I. E.O. 13175 (Indian Tribal Governments)

This rule does not have Tribal implications under E.O. 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

J. National Environmental Policy Act of 1969

FMCSA analyzed this rule pursuant to the National Environmental Policy Act of 1969 (42 U.S.C. 4321, et seq.) and determined this action is categorically excluded from further analysis and documentation in an environmental assessment or environmental impact statement under FMCSA Order 5610.1 (69 FR 9680), Appendix 2, paragraph

³ Pub. L. 108-447, 118 Stat. 2809, 3268, note following 5 U.S.C. 552a (Dec. 4, 2014).

6(b). This Categorical Exclusion (CE) covers minor revisions to regulations. The requirements in this rulemaking are covered by this CE.

List of Subjects in 49 CFR 385

Administrative practice and procedure, Highway safety, Incorporation by reference, Mexico, Motor carriers, Motor vehicle safety, Reporting and recordkeeping requirements.

In consideration of the foregoing, FMCSA amends 49 CFR chapter III, part 385, as set forth below:

PART 385--SAFETY FITNESS PROCEDURES

1. The authority citation for part 385 continues to read as follows:

Authority: 49 U.S.C. 113, 504, 521(b), 5105(d), 5109, 5113, 13901-13905, 13908, 31135, 31136, 31144, 31148, 31151, 31502; Sec. 113(a), Pub. L. 103-311, 108 Stat. 1673, 1676; Sec. 408, Pub. L. 104-88, 109 Stat. 803, 958; Sec. 350, Pub. L. 107-87, 115 Stat. 833, 864; sec. 5205, Pub. L. 114-94, 129 Stat. 1312, 1537; and 49 CFR 1.87.

2. Revise § 385.4 to read as follows:

§ 385.4 Matter incorporated by reference.

(a) Certain material is incorporated by reference into this part with the approval of the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. All approved incorporation by reference (IBR) material is available for inspection at the FMCSA and at the National Archives and Records Administration (NARA). Contact FMCSA at: Federal Motor Carrier Safety Administration, Office of Enforcement and Compliance, 1200 New Jersey Ave. SE, Washington, DC 20590; Attention: Chief, Compliance Division at (202) 366-1812. For information on inspection at NARA, visit www.archives.gov/federal-register/cfr/ibr-locations.html or email fr.inspection@nara.gov. The material may be obtained from the source in the following paragraph of this section.

(b) Commercial Vehicle Safety Alliance (CVSA), 99 M Street, SE, Suite 1025,

Washington, DC 20003, telephone (202) 998-1002, www.cvsa.org.

(1) “North American Standard Out-of-Service Criteria and Level VI Inspection Procedures and Out-of-Service Criteria for Commercial Highway Vehicles Transporting Transuranics and Highway Route Controlled Quantities of Radioactive Materials as defined in 49 CFR Part 173.403,” April 1, 2022, incorporation by reference approved for § 385.415(b).

(2) “Operational Policy 4: Inspector Training and Certification”, Revised April 29, 2021 (CVSA Operational Policy 4); incorporation by reference approved for § 385.207. (Also available at www.fmcsa.dot.gov/certification).

Issued under authority delegated in 49 CFR 1.87.

Robin Hutcheson
Administrator

[FR Doc. 2022-27774 Filed: 12/21/2022 8:45 am; Publication Date: 12/22/2022]